Supreme Court, U.S.
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No. 07-101

In The
Supreme Court of the United States

JACQUELINE FINLAYSON-GREEN,

Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether Section 242B(c)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. 1525b(c)(3), which provides in pertinent part that an *in absentia* order of removal may be rescinded "upon motion to reopen filed within 180 days after the date of the order of deportation if the alien demonstrates that the failure to appear was because of exceptional circumstances" is jurisdictional or can be equitably tolled?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit, in conflict with the Second, Third, Fourth and Ninth Circuits, held that the 180-day deadline for reopening an *in absentia* order of removal based on exceptional circumstances is mandatory and jurisdictional, and may not be tolled based on petitioner's claim of ineffective assistance of counsel. Certiorari should be granted to resolve the split in the circuits, which undermines the longstanding policy of national uniformity in enforcement of the immigration laws.

OPINIONS OF THE COURTS BELOW

The decision of the court of appeals (App. 1-5) is not published in the Federal Reporter, but can be found at *Finlayson-Green v. U.S. Attorney Gen.*, 06-14947 (11th Cir. April 25, 2007). The *per curiam* order of the Board of Immigration Appeals (App. 15-16) and the decision of the Immigration Judge (App. 17-18) are unreported.

JURISDICTION

The Eleventh Circuit Court of Appeals entered its judgment on April 25, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS

Section 240(b)(5) of the Immigration and Nationality Act states in pertinent part:

> (A) In general. – Any alien who, after written notice required under paragraph (1) or (2) of section 239(a) has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2)) . . .
>
> (C) Rescission of order. – Such an order may be rescinded only – (i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1)) . . .

8 U.S.C. 1229(a)(b)(5)(A); 8 U.S.C. 1229(a)(b)(5)(C)(i)

STATEMENT

Statutory History

In the Immigration Act of 1990, Pub. L. No. 101-649, Tit. V, § 545(a), 104 Stat. 5061, Congress took steps to reduce the frequency with which aliens failed to appear at their scheduled deportation hearings. *See* H.R. Rep. No. 681, 101st Cong., 2d Sess. Pt. 1 at 150 (1990). Congress required the former Immigration and Naturalization Service (INS) to provide aliens in removal proceedings written notice of the nature of the proceeding, the grounds

for the charge of removability, the alien's right to be represented by counsel, and the consequences of failing to appear at the proceeding. 8 U.S.C. 1229(a)(1) and (2). Congress then directed that an alien who fails to appear at his deportation hearing "shall be ordered removed *in absentia* if the INS establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable" 8 U.S.C. 1229(a)(b)(5)(A).

If the alien received the statutorily required notice and was not prevented from appearing due to being held in federal or state custody, then the alien may not seek rescission of the removal order entered in absentia unless the alien moves "within 180-days after the date of the order of removal" to reopen the removal proceeding and "demonstrates that the failure to appear was because of exceptional circumstances (as defined in [8 U.S.C. 1229(e)(1)])." 8 U.S.C. 1229(a)(b)(5)(C)(i). The term "exceptional circumstances" refers to circumstances beyond the control of the alien, such as serious illness of the alien or death of an immediate relative, but not including less compelling circumstances. 8 U.S.C. 1229(a)(e)(1). Exceptional circumstances can be demonstrated when counsel has been ineffective, and ineffective assistance of counsel is a well-established basis for granting a motion to reopen in Immigration Court pursuant to the Board of Immigration Appeals' (BIA) holding in *Matter of Lozada*, 19 I & N Dec. 637 (BIA 1988). In fact, the BIA has held that a petitioner does not need to demonstrate prejudice when an attorney's incompetence led to an *in absentia* order. *See Matter of Rivera-Carlos*, 21 I & N Dec. 599 (BIA 1996); *Matter of Grijalva*, 21 I & N Dec. 472 (BIA 1996).

Administrative regulations incorporate the statutory requirements for obtaining reopening of an in absentia removal order in the immigration court. *See* 8 C.F.R. 1003.23(b)(4)(ii). The regulations further provide that an alien may not appeal the entry of an *in absentia* removal order directly to the BIA. 8 C.F.R. 1240.15. Rather, the alien may make an appeal to the BIA if the immigration judge (IJ) denies the alien's motion to reopen the removal proceeding. *See Matter of Guzman*, 22 I & N Dec. 722, 723 (BIA 1999) (en banc) ("Only when an alien has exhausted this avenue of relief [by filing a motion to reopen] may he or she file an appeal with the [BIA].").

In amending the Immigration and Nationality Act (INA), through the Immigration Act of 1990, with respect to the period of time and numerical limitations in which motions to reopen and motions to reconsider may be offered in deportation proceedings, Congress' apparent aim was to eliminate the prior practice under which an alien could ignore a deportation or voluntary departure order, and years later, attempt to reopen the proceedings without any adverse consequences. *See Stone v. INS*, 514 U.S. 386, 400, 131 L. Ed. 2d 465, 115 S. Ct. 1537 (1995) (noting that the Immigration Act of 1990 "took . . . steps to reduce [the] abuses of successive and frivolous administrative appeals and motions").

The legislative history of this provision indicates, however, that while Congress sought to impose general limits on motions to reopen, these limits were not intended to be inflexible. In explaining these new limitations, the House Conference Committee directed that, "the Attorney General ... shall consider exceptions in the interest of justice." H.R. Conf. Rep. No. 101-955, at 133 (1990). The Committee explicitly mentioned one such exception, for

"asylum claims which arise due to a change in circumstances in the country of the alien's nationality after the initiation of the deportation proceedings." *Id.* The Department of Justice responded to this congressional mandate by issuing rules that, while clearly establishing that only one motion to reopen would be permitted and that it must be filed within 90 days, also offered mechanisms whereby otherwise untimely motions could still be considered when the circumstances so required.

Under the new regulations, the time and numerical limits for motions to reopen do "not apply to a motion to reopen agreed upon by the parties [*i.e.*, the INS and the alien] and jointly filed." 8 C.F.R. 1003.23(b)(4)(iv) (2000). Moreover, an IJ or the BIA are permitted to reopen a proceeding, upon their own motions, at any time. *See* 8 C.F.R. 1003.23(b)(1) (2000) ("An [IJ] may upon his or her own motion at any time . . . reopen . . . any case in which he or she has made a decision. . . ."); 8 C.F.R. 1003.2(a) (2000) ("The [BIA] may at any time reopen . . . on its own motion any case in which it has rendered a decision."). In explaining the exercise of this authority, the BIA has stated that,

> the regulations governing motions . . . give the [BIA] clear authority to reopen and remand cases without regard to other regulatory provisions. . . . It would therefore appear that [the BIA] has the ability to reopen or remand proceedings when appropriate, such as for good cause, fairness, or reasons of administrative economy, and that technical deficiencies alone would not preclude such action.

Matter of Yewondwosen, 21 I & N Dec. 1025 (BIA 1997). The authority of an IJ or BIA to accommodate special cases has

survived a subsequent statutory codification of the limits on motions to reopen that, on its face, admits to no such exceptions, further demonstrating that the Department of Justice, in its application of these limits, does not consider them to be jurisdictional. A few months after the Department of Justice promulgated the final rule limiting motions to reopen, Congress established new "removal" proceedings to replace the former "deportation" or "exclusion" proceedings, and in so doing provided the same limits on the reopening of proceedings. *Cf.* 61 Fed. Reg. 18, 900 (promulgating administrative rule on April 29, 1996) with Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, div. C, Tit. III, 304(a)(3), 100 Stat. 3009-593 (enacting statutory rules on Sept. 30, 1996) (codified at 8 U.S.C. 1229(a)(c)(6)(C)). The statutory provisions follow the administrative rule in limiting an alien to "one motion to reopen proceedings," that "shall be filed within 90 days of the date of the entry of a final administrative order." 8 U.S.C. 1229(a)(c)(6)(A), (C)(i). The administrative regulations continue to provide, nevertheless, for *sua sponte* reopening by an IJ or the BIA, or reopening by agreement of the parties at any time, despite the fact that no such exceptions are found in the more recent statutory provisions. *See* 8 C.F.R. 1003.23(b)(1), (b)(4)(iv); 8 C.F.R. 3.2(a) (2000). Whether in the form of specific limits, or the authority for the Department of Justice to impose such limits, the flexibility with which IJs and the BIA have applied these congressional restrictions on motions to reopen confirms that they are not jurisdictional. *See Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000).

In sum, nothing in the 1990 statute that directed the Department of Justice to limit the timing and number of motions to reopen show that these limitations were intended

to be jurisdictional and therefore not subject to equitable tolling.

B. Factual and Procedural Background

Petitioner is a native and citizen of Jamaica. Petitioner entered the United States on December 31, 1996 and has remained in the United States since that time. On March 11, 1997, Petitioner married a United States citizen who filed a visa petition on her behalf, along with her application for adjustment of status. On September 3, 1999, the INS denied Petitioner's application for adjustment of status for failure to appear at the interview. Petitioner maintains that she and her husband appeared for the interview, but it was not held because her husband did not bring any identification. (App. 8).

On August 25, 1999, Petitioner's husband withdrew the petition with a statement alleging the marriage was not *bona fide*. However, the Petitioner maintains that the marriage was *bona fide* and asserts that she divorced her husband on October 28, 1999 because he was a drug addict. *Id.* On October 8, 1999, the Service commenced proceedings to remove petitioner from the United States. *Id.* After her divorce, petitioner moved from Florida to Arizona and she retained an attorney in Arizona, Dorothea Kraeger, to represent her in her removal proceedings. Petitioner married another United States citizen on May 6, 2000. (App. 8 and App. 10). His visa petition on her behalf was approved on May 10, 2006. They have two United States citizen children. *Id.*

Ms. Kraeger filed a motion to change venue and motion for a telephonic hearing with the immigration court in Miami, Florida which was denied on November

29, 1999. The IJ found that the issues of removability were not resolved. (App. 21). Subsequently, Ms. Kraeger filed a motion to reconsider the denial of change of venue request and a motion for a telephonic hearing, which were both denied on December 14, 1999, based on petitioner's non-admission of the factual allegations against her. (App. 19). On the same date, the IJ determined that petitioner was removable from the United States, and entered an in absentia order of removal to Jamaica. (App. 17-18). Subsequently, Ms. Kraeger failed to file a motion to reopen with the immigration court, and instead filed an appeal of the IJ's in absentia order of removal with the BIA. On April 16, 2003, the Board of Immigration Appeals affirmed the IJ's removal order without opinion. (App. 15-16). In May 2003, Ms. Kraeger filed a Petition for Review with the United States Court of Appeals for the Eleventh Circuit. The Petition was dismissed on September 8, 2003, because Ms. Kraeger failed to file a brief. (App. 14).

Ms. Kraeger was suspended by the Arizona bar on April 23, 2005. (App. 7). Ms. Kraeger was also suspended from practice before the Board of Immigration Appeals. (App. 12-13). Petitioner maintains that Ms. Kraeger's ineffective assistance as counsel resulted in her failure to attend the removal hearing, and her failure to properly appeal the *in absentia* removal order to the Eleventh Circuit Court. (App. 2). In October 2005, Petitioner, through new counsel, filed a Motion to Reopen with the BIA due to the ineffective assistance of Ms. Kraeger, pursuant to the BIA's holding in *Matter of Lozada*, 19 I & N Dec. 637 (BIA 1988). The BIA denied petitioner's Motion to Reopen on April 10, 2006, stating that Petitioner failed "to adequately explain why she waited so long to file the pending motion ... or why Franquinha [petitioner's

attorney at that time] could not have assisted Petitioner in filing an earlier motion." (App. 13).

Petitioner submitted a motion to reconsider the decision on May 9, 2006, with an affidavit from the petitioner detailing the timeline of events that led to her Motion to Reopen ultimately being filed in October 2005. Petitioner requested that the Board reopen the case *sua sponte* under 8 C.F.R. 1003.2(a) because the Motion to Reopen was filed outside the 180-day time limit, or that the BIA recognize the doctrine of equitable tolling in her case.

The Board denied petitioner's motion to reconsider on August 15, 2006, stating "[because the respondent failed to meet the requirements for reopening an *in absentia* order of removal set forth under section 240B(5) [*sic*] of the Act, the Board has no authority to rescind the Petitioner's order of deportation." The Board went on to state, "[t]he Eleventh Circuit has held that the requirements of section 240(b)(5) of the Act are mandatory and jurisdictional. *Anin v. Reno*, 188 F.3d 1273 (11th Cir. 1999); *see Abdi v. United States Attorney Gen.*, 430 F.3d 1148 (11th Cir. 2005)." (App. 7-10).

Petitioner timely filed a petition for review of the BIA's decision with the Eleventh Circuit. On April 25, 2007, the Eleventh Circuit denied the petition and affirmed the decision of the BIA. The court determined that the BIA did not abuse its discretion as petitioner filed a motion to reopen over 2 years after the BIA issued its decision affirming the IJ's in absentia order. The court found that the 180-day time limitation as set forth by 8 U.S.C. 1229(a)(1); 8 U.S.C. 1229(a)(b)(5)(C); 8 C.F.R. 1003.23(b)(4)(ii), is "jurisdictional and mandatory" and cannot be equitably

tolled on account of ineffective assistance of counsel. *Anin v. Reno*, 188 F.3d 1273, 1278-79 (11th Cir. 1999). The Court failed to consider Petitioner's claims that her *in absentia* order of removal was a direct result of the ineffective assistance rendered by her counsel. The Court found only that the time limitations for motions to reopen are jurisdictional and cannot be equitably tolled on account. (App. 1-5).

REASONS FOR GRANTING THE PETITION

A. The Decision of the Eleventh Circuit Conflicts With The Decisions of Five Other Circuit Courts.

The circuit split warrants review by this court. The conflict among the circuits creates disparate treatment of aliens depending on where they reside. The schism violates the fundamental principle that immigration laws should be applied uniformly across the country.

Pursuant to Section 240(b)(5) of the INA, when an alien fails to appear as directed in a notice of a removal hearing, the alien "shall be ordered removed in absentia" if the government "establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable." 8 U.S.C. 1229(a)(b)(5)(A). Such an order can be rescinded "only" (1) if the alien files a motion to reopen within 180 days of the order's entry and successfully demonstrates that the failure to appear was because of exceptional circumstances or (2) at any time if the alien demonstrates that she did not receive the notice to appear in accordance with 8 U.S.C. 1229(a)(1) and (2). 8 U.S.C. 1229(a)(b)(5)(C); 8 C.F.R. 1003.23(b)(4)(ii). It is well established that the Fifth

Amendment entitles aliens to due process of law in deportation proceedings. *Reno v. Flores*, 507 U.S. 292, 307, 123 L. Ed. 2d 1, 113 S. Ct. 1439 (1993) (*citing The Japanese Immigrant Case*, 189 U.S. 86, 100-101, 47 L. Ed. 721, 23 S. Ct. 611 (1903)). During deportation proceedings aliens have a statutory right to be represented by counsel at their own expense. 8 U.S.C. 1362 (1994). The Circuit Courts are in general agreement that counsel's ineffectiveness can give rise to a due process violation, and have contemplated that the vehicle commonly used to redress claims of ineffective assistance of counsel in deportation proceedings has been an administrative motion to reopen proceedings. *Saakian v. INS*, 252 F.3d 21 (1st Cir. 2001); *Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000); *Lu v. Ashcroft*, 259 F.3d 127 (3d Cir. 2001); *Stewart v. INS*, 181 F.3d 587 (4th Cir. 1999); *Goonsuwan v. Ashcroft*, 252 F.3d 383 (5th Cir. 2001); *Store v. INS*, 256 F.3d 498 (7th Cir. 2001); *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002); *Akinwunmi v. INS*, 194 F.3d 1340 (10th Cir. 1999).

The disparity between the circuit courts lies in their varying approaches to the equitable tolling doctrine and whether it should be used to toll filing deadlines for motions to reopen based on ineffective assistance of counsel. Only the Eleventh Circuit has explicitly rejected the argument that equitable tolling applies to filing deadlines for motions to reopen based on ineffective assistance of counsel. *Anin*, 188 F.3d at 1278. The Eleventh Circuit has held that the 180-day time limitation is "jurisdictional and mandatory" and cannot be equitably tolled on account of ineffective assistance of counsel. *Id.* The Ninth, Second, Third, Fourth and Seventh Circuits have held that when a Petitioner does not discover his attorney's malpractice within the 90- or 180-day window,

the deadline will be equitably tolled. *Rodriguez-Lariz*, 282 F.3d 1218 (9th Cir. 2002); *Socop-Gonzales v. INS*, 272 F.3d 1176 (9th Cir. 2001) (en banc); *Varela v. INS*, 204 F.3d 1237 (9th Cir. 2000); *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999); *Mahmood v. Gonzales*, 427 F.3d 248, 251 (3d Cir. 2005); *Iavorski v. INS*, 232 F.3d 879 (2nd Cir. 2000); *Davies v. INS*, 2001 U.S. App. Lexis 22912 (4th Cir. 2001); *Pervaiz v. Gonzales*, No. 04-2958, 2005 WL 949080 (7th Cir. 2005). This allows a Petitioner, with a showing of due diligence after discovering the malpractice, to stop the 90 or 180-day period from running until the Petitioner discovers (or should discover) that the attorney acted fraudulently or ineffectively. Similarly, the Supreme Court has held that

> where a plaintiff has been injured by fraud and "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of that statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts ... to conceal it from the knowledge of the other party."

Homberg v. Armbrecht, 327 U.S. 392, 397, 90 L. Ed. 743, 66 S. Ct. 582 (1946) (quoting *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348, 22 L. Ed. 636 (1874); *Federal Election Comm'n v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996). "'This equitable doctrine is read into every federal statue of limitation.'" *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999) (quoting *Homberg*, 327 U.S. at 397; *Federal Election Comm'n*, 104 F.3d at 240).

Failure to review this issue will perpetuate incongruous treatment of aliens based on geography. Congress expressly recognized the policy of uniformity in the immigration laws when it enacted the Immigration Reform and Control Act

of 1986, stating "It is the sense of the Congress that. . . . the immigration laws of the United States should be enforced vigorously and uniformly." 11 Pub. L. No. 99-603, 115, 100 Stat. 3359, 3385 (1986). The Courts of Appeals have often recognized the importance of uniform enforcement of immigration laws. Ironically, the Eleventh Circuit, which is in opposition to five circuits on the issue presented, has stated, "The laws that we administer often affect individuals and the cases we administer in the most fundamental ways. We think that all would agree that to the greatest extent possible *our immigration laws should be applied in a uniform manner nationwide . . .* " *Saramillo v. INS,* 1 F.3d 1149, 1166 (11th Cir. 1993) (emphasis added). The Seventh Circuit similarly stated, "National uniformity in the immigration and naturalization laws is paramount: rarely is the vision of a unitary nation so pronounced as in that laws that determine who may cross our national borders and who may become a citizen." *Rosedo-Ramirez v. INS*, 32 F.3d 1085, 1091 (7th Cir. 1994). *See also, e.g., Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004); *Aguirre v. INS*, 79 F.3d 315 (2d Cir. 1996). The split between the Circuit Courts with regard to the nature of the 180-day deadline for filing a motion to reopen removal proceedings is ripe for the Court's consideration. The question presented will not benefit from further consideration in the Circuit Courts.

B. Review Is Also Warranted Because The Decision Below is Clearly Incorrect And Is Contrary to Congressional Intent

Lower Court decisions holding that the 180-day filing deadline is mandatory and jurisdictional are unpersuasive. The Eleventh Circuit in its decision below denied the

petition for review, finding that it has held that the 180-day time limitation in Section 1229(a) is "jurisdictional and mandatory" and cannot be equitably tolled on account of ineffective assistance of counsel. *Anin*, 188 F.3d at 1278-79. The Eleventh Circuit, therefore, did not consider petitioner's claim that her *in absentia* order was a direct result of the ineffective assistance rendered by her counsel. Although *Anin* held that Section 1229(a) has a jurisdictional limit, Supreme Court precedent and statutory interpretation demonstrate that it is better viewed as a tollable statute of limitation. The Supreme Court held that if the time limit is contained in an ordinary statue of limitations it is assumed that it is subject to equitable tolling. *See Irwin v. Department of Veteran Affairs*, 498 U.S. 89, 95-96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990). In *Irwin*, the Court noted that there is a "rebuttable presumption" that equitable tolling applies to federal statutes, and nothing in the INA rebuts this presumption. *Id.* Section 1229(a) contains no specific tolling provision, suggesting that Congress did not want to override the normal pro-tolling presumption, nor does the statute contain detailed or emphatic language. Indeed, it is linguistically similar to numerous other statutes that courts have held to be subject to equitable tolling.

Similarly, the legislative history and statutory purpose evince no congressional intent to limit courts' equitable powers. The history demonstrates a clear concern with prosecutorial fairness and individual equities, and while the statute's purpose includes preventing collusive obstruction, Congress did not intend to limit courts' presumed powers to redress injustice. Given this evidence, the Eleventh Circuit's jurisdictional conclusion seems mistaken.

As courts cannot toll jurisdictional deadlines, a congressional intent to allow tolling would strongly suggest that Congress did not intend to restrict courts' jurisdiction. Congressional intent is, thus, of central concern, and the Court has provided guidance for interpreting it in this context. In *United States v. Locke*, the Court noted that "statutory filing deadlines are generally subject to the defense of . . . equitable tolling," and because Congress is aware of this, there is a "rebuttable presumption" that equitable tolling applies to suits against both private defendants and the United States. *United States v. Locke*, 471 U.S. 84, 94 (1985). A court confronting the issue of whether a filing deadline is tollable must ask the question: "Is there good reason to believe that Congress did not want the equitable tolling doctrine to apply?" *United States v. Brockamp*, 519 U.S. 347, 350, 136 L. Ed. 2d 818, 117 S. Ct. 849 (1997). Here, as in other situations, the silence of Congress may express a clear legislative intent. *Landsgraf v. USI Film Products*, 511 U.S. 244, 280, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994) (noting the "traditional presumption" that statues will not be held to have retroactive effect "absent clear congressional intent favoring such a result").

Anin did not explain its jurisdictional reasoning in its determination that the filing deadline is mandatory and jurisdictional, and the court of appeals case, on which it relied, *Kamara v. INS*, provides scant support for its position. *Anin* at 1278-79; *Kamara v. INS*, 149 F.3d 904, 906 (8th Cir. 1988) In *Kamara*, the Eighth Circuit held that the BIA "did not err" in denying as time barred a tardy motion to reopen. *Id.* The court nowhere termed the deadline jurisdictional, nor did it hold that equitable modification was beyond its power. As such, the Eleventh Circuit's jurisdictional holding goes far beyond the Eighth

Circuit's, and neither opinion defends its statutory interpretation in a setting where the Court normally presumes equitable powers.

The Ninth, Second, Third, Fourth and Seventh Circuits have recognized the equitable tolling doctrine where the ineffective assistance of counsel suffered by the petitioner warranted reopening. *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002); *Socop-Gonzales v. INS*, 272 F.3d 1176 (9th Cir. 2001) (en banc); *Varela v. INS*, 204 F.3d 1237 (9th Cir. 2000); *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999); *Mahmood v. Gonzales*, 427 F.3d 248, 251 (3d Cir. 2005); *Iavorski v. INS*, 232 F.3d 879 (2d Cir. 2000); *Davies v. INS*, 2001 U.S. App. Lexis 22912 (4th Cir. 2001); *Pervaiz v. Gonzales*, No. 04-2958, 2005 WL 949080 (7th Cir. 2005). The First Circuit has declined to make a finding. *See Jobe v. INS*, 238 F.3d 96 (1st Cir. 2001).

While recognizing the equitable tolling doctrine, the circuit courts have analyzed the text, structure, legislative history, and purpose of Congress' 1990 amendment to the INA in their respective determinations that that the limitations imposed on motions to reopen in deportation proceedings are subject to equitable tolling. *See Lopez v. INS*, 184 F.3d 1097; *Iavorski*, 232 F.3d 879.

The Second and Ninth Circuit Courts have correctly determined that the 1990 Immigration Act and subsequent regulations do not indicate that Congress intended to impose a jurisdictional limit on the filing deadline for a motion to reopen based on ineffective assistance of counsel. *Id.* In fact, the legislative history indicates that while Congress sought to impose general limits on motions to reopen, these limits were not intended to be inflexible. In explaining the limits on motions to reopen, the House

Conference Committee directed that, "the Attorney General . . . shall consider exceptions in the interest of justice." H.R. Conf. Rep. No. 101-995, at 133 (1990).

The First Circuit has recognized that the text, of the statue in question, says nothing explicitly about whether equitable tolling is allowed. *See Jobe v. INS*, 238 F.3d 96 (1st Cir. 2001). In prior cases courts have found that the presence or absence of the words "limitations" or "jurisdiction" to be important, because a statute of limitation is usually subject to equitable tolling, while a jurisdictional provision never is. *Miller v. New Jersey State Dep't of Corrections*, 145 F.3d 616, 617 (3d Cir. 1998) (finding persuasive the use of "period of limitations' and limitations period" and absence of word "jurisdiction"); *Shendock v. Director, Office Workers' Comp. Programs*, 893 F.2d 1458, 1462 (2d Cir. 1990) (giving considerable weight to Congress's use of "jurisdiction" in filing provision. Here, the statue contains neither of these terms. Moreover, the potential result of not allowing equitable tolling for filing a motion to reopen based on an *in absentia* order of deportation, would raised due process concerns. The Courts have recognized that non-citizens are entitled to due process. The Courts have determined that when counsel's performance is so ineffective as to have impinged on the fundamental fairness of the hearing it is a violation of the Fifth Amendment due process clause. A jurisdictional filing deadline for a motion to reopen under these circumstances would give no recourse to petitioner whose due process rights are violated.

The INA's 180-day filing deadline for contesting in absentia deportation is best viewed as an equitably tollable statue of limitations, rather than a limit on the courts' jurisdiction. In *Irwin*, this court established that when a time limit is contained in a statue of limitations it is

assumed that it is subject to equitable tolling, absent contrary congressional intent. Nothing in the INA's text, legislative history or purpose indicates that the 180-day filing deadline is jurisdictional, and therefore, the Eleventh Circuit's decision is in error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ADAM S. HANDLER
LAW OFFICES OF SPAR & BERNSTEIN, P.C.
225 Broadway, Suite 512
New York, NY 10007
Telephone: (212) 227-3636

Counsel for Petitioner

July 2007

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-14947
Non-Argument Calendar

Agency No. A76-531-649

JACQUELINE FINLAYSON-GREEN,

Petitioner,

versus

U.S. ATTONEY GENERAL,

Respondent.

Petition for Review of a Decision
of the Board of Immigration Appeals

(April 25, 2007)

Before TJOFLAT, HULL and WILSON, Circuit Judges.

PER CURIAM:

Jacqueline Finlayson-Green, a native and citizen of Jamaica, appeals the Board of Immigration Appeal's ("BIA") denial of her motion to reconsider its denial of her motion to reopen. In this case, the Immigration Judge ("IJ") ordered Finlayson-Green removed *in absentia*.

Background

Finlayson-Green was ordered removed *in absentia*, after her counsel advised her not to attend a removal hearing for which Finlayson-Green had received a notice to appear. Finlayson-Green's counsel had filed a motion to change venue, which was denied, and a motion for reconsideration of the denial, which was denied at the hearing. At the removal hearing, the IJ found that Finlayson-Green had received notice of the hearing and had been properly served before ordering her removed *in absentia*.

Finlayson-Green appealed the order to the BIA, arguing the IJ had improperly denied her motion for a change of venue or telephonic appearance. The BIA affirmed without opinion. In October 2005, Finlayson-Green filed a motion to reopen with the BIA through new counsel. In the motion, Finlayson-Green alleged that her previous counsel rendered ineffective assistance of counsel, which resulted in Finlayson-Green's failure to attend the removal hearing, and the failure to properly appeal the *in absentia* removal order to this Court. The BIA denied the motion as untimely and also denied Finlayson-Green's subsequent motion to reconsider.

Standard of Review

We review the denial of a motion to reopen for abuse of discretion, and we are limited to "determining whether there has been an exercise of administrative discretion and whether the matter of exercise has been arbitrary or capricious." *Ali v. U.S. Att'y Gen.*, 443 F.3d 804, 808 (11th Cir. 2006) (per curiam) (citation and quotation marks omitted). Motions to reconsider are also reviewed for abuse of discretion. *Assa'ad v. U.S. Att'y Gen.*, 332 F.3d 1321,

1341 (11th Cir. 2003). Motions to reconsider and reopen are disfavored, especially in a removal proceeding, "where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS v. Doherty*, 502 U.S. 314, 323, 112 S. Ct. 719, 724-25, 116 L. Ed. 2d 823 (1992) (discussing motions to reopen).

Discussion

Finlayson-Green argues that the BIA wrongfully concluded that the untimeliness of her motion to reopen deprived it of jurisdiction over the motion and her subsequent motion to reconsider. Finlayson-Green also argues that the BIA should have applied equitable tolling or reopened her case *sua sponte*.

The BIA did not abuse its discretion by failing to apply equitable tolling to Finlayson-Green's petition to reopen. When an alien fails to appear as directed in a notice of a removal hearing, the alien "shall be ordered removed in absentia" if the government "establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable." 8 U.S.C. § 1229a(b)(5)(A). Such an order can be rescinded "only" (1) if the alien files a motion to reopen within 180 days of the order's entry and successfully demonstrates that the failure to appear was because of exceptional circumstances, or (2) at any time if the alien demonstrates that she did not receive the notice to appear in accordance with 8 U.S.C. § 1229(a)(1) and (2). 8 U.S.C. § 1229a(b)(5)(C); 8 C.F.R. § 1003.23(b)(4)(ii).

Finlayson-Green does not contend that she did not receive notice to appear; instead she admits that she did receive it, but contends that she failed to appear due to the ineffective assistance of her counsel. Finlayson then filed her motion to reopen over 2 years after the BIA issued its decision affirming the IJ's *in absentia* removal order. We have held that the 180-day time limitation is "jurisdictional and mandatory" and cannot be equitably tolled on account of ineffective assistance of counsel. *Anin v. Reno*, 188 F.3d 1273, 1278-79 (11th Cir. 1999) (per curiam). Therefore, the BIA did not abuse its discretion in denying the motion to reopen based on untimeliness.

While we have jurisdiction to review the BIA's decision not to exercise its *sua sponte* authority to reopen or reconsider, we hold that the BIA did not abuse its discretion. Decisions not to reopen under § 1003.2(a) are reviewed for an abuse of discretion. *See Anin*, 188 F.3d at 1279. While the BIA may *sua sponte* grant a motion to reopen at any time pursuant to 8 C.F.R. § 1003.2(a), the BIA has wide discretion to deny such a motion, even if the moving party has met its *prima facie* burden to reopen. 8 C.F.R. § 1003.2(a). Under § 1003.2(a), the BIA has the discretion to reopen the proceedings "as it sees fit." *Anin*, 188 F.3d at 1279 (discussing 8 C.F.R. § 3.2(a) a prior version of § 1003.2(a)). Given the untimeliness of Finlayson-Green's motions, we can find no abuse of discretion here.

Upon review of the administrative record and the parties' briefs, we discern no error in the BIA's decisions. The BIA committed no errors of law or fact by denying her motion to rescind and, thus, also did not abuse its

discretion in denying the motion to reconsider. Accordingly, we deny the petition for review.

PETITION DENIED.

Charles H. Kuck
Kuck, Casablanca LLC
8010 ROSWELL RD STE 300
ATLANTA GA 30350-7014

April 25, 2007

Appeal Number: 06-14947-GG
Case Style: Jacqueline Finlayson-Green v. U.S. Atty. Gen.
Agency Number: A76-531-649 ()

CC: Charles H. Kuck

CC: David V. Bernal

CC: Michelle G. Latour

CC: Anthony C. Nicastro

CC: P. Michael Truman

CC: Administrative File

[LOGO] **U.S. Department of Justice**

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

FINLAYSON-GREEN
JACQUELINE
14634 NORTH 64TH
AVENUE
GLENDALE, AZ
85014-0000

Office of the Chief Counsel/
MIA
333 South Miami Ave.,
Suite 200
Miami, FL 33130

Name: FINLAYSON-GREEN JACQUELINE

A76-531-649

Date of this notice:
08/15/2006

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ Donna Carr
Donna Carr
Acting Chief Clerk

Enclosure

Panel Members:
PAULEY, ROGER

U.S. Department of Justice
Executive Office For Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A76 531 649 – Miami Date: Aug. 15, 2006

In re: JACQUELINE FINLAYSON-GREEN

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Pro se

APPLICATION: Motion to reconsider

An Immigration Judge on December 14, 1999, found the respondent removable under section 237(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. §1227(a)(1)(B), and ordered her deported to Jamaica in absentia. The respondent, through counsel, filed an appeal to the Board of Immigration Appeals. On April 16, 2003, the Board summarily affirmed the Immigration Judge's decision. The respondent filed an appeal with the Eleventh Circuit Court of Appeals, which was dismissed on September 18, 2003. Her attorney was suspended by the Arizona bar on April 23, 2005. She filed an untimely motion to reopen with the Board on October 28, 2005. The Board denied the motion on April 10, 2006, because it was untimely and failed to meet the requirements for an exception to the denial of an untimely motion to reopen an in absentia proceeding. On May 9, 2006, she filed a motion to reconsider. The motion will be denied.

The respondent married a United States citizen on March 11, 1997, and he filed a visa petition on her behalf, along with her application for adjustment of status. The Notice to Appear was issued on October 8, 1999, after she and her husband did not appear for their interview.[1] On August 25, 1999, the respondent's husband withdrew the petition with a statement that the marriage was a sham and that she had paid him to marry her to gain immigration benefits. The Immigration and Naturalization Service denied her adjustment of status on September 3, 1999. She was divorced from her husband on October 28, 1999. The respondent married another United States citizen on May 6, 2000. His visa petition on her behalf was approved on May 10, 2006. They have two United States citizen children. She contends the Board erred in denying her motion to reopen because she was the victim of ineffective assistance of counsel. She wishes the proceedings to be reopened and remanded so she can apply for adjustment of status.

The respondent is a 42-year-old native and citizen of Jamaica who entered the United States on or about December 31, 1996, as a visitor and remained longer than permitted. She asserts that she divorced her first husband because he was a drug addict and that the marriage had been bona fide. She moved from Florida to Arizona after her divorce and she found an attorney there whom she hired to help her. She states that the motion to reopen in absentia proceedings should be granted because she was the victim of ineffective assistance of counsel. Because the

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[1] The respondent contends that they did appear for the interview, but it was not held because her husband had not brought any identification.

respondent failed to meet the requirements for reopening an in absentia order of removal set forth under section 240B(5) of the Act, the Board as has no authority to rescind the respondent's order of deportation.

A motion to reconsider is used to allege errors in appraising the facts and the law and must be supported by precedent decisions. 8 C.F.R. § 1003.2(b)(1). *See Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991), *aff'd*, *Cerna v. INS*, 979 F.2d 212 (11th Cir. 1992); *Matter of Tiwari*, 20 I&N Dec. 254 (BIA 1991). An order of removal following proceedings conducted in absentia pursuant to section 240(b)(5) of the Act, 8 U.S.C. § 1229a(b)(5), may be rescinded only upon a motion to reopen filed within 180 days after the date of the order of removal which demonstrates that the alien failed to appear because of exceptional circumstances, or upon a motion filed at any time if he did not receive proper notice of the hearing, or he was in Federal or State custody and failed to appear through no fault of his own. *See* 8 C.F.R. § 1003.23(b)(4)(iii). The term "exceptional circumstances" refers to exceptional circumstances beyond the control of the alien, such as serious illness of the alien or death of an immediate relative, but not including less compelling circumstances. Section 240(e)(1) of the Act, 8 U.S.C. § 1229a(e)(1).

The Eleventh Circuit has held that the requirements of section 240(b)(5) of the Act are mandatory and jurisdictional. *Anin v. Reno*, 188 F.3d 1273 (11th Cir. 1999); *see Abdi v. United States Attorney General*, 430 F.3d 1148 (11th Cir. 2005). Moreover, the respondent does not claim she was unaware of the hearing in Miami, and she would not have been eligible for any relief from removal, even if she had attended the hearing. The respondent does not meet the statutory requirements for recision of the in

absentia order. Therefore, the Board did not err in denying the motion to reopen.

Accordingly, the motion will be denied.

ORDER: The motion to reconsider is denied.

/s/ Roger Pauley
FOR THE BOARD

[LOGO] **U.S. Department of Justice**

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

RACHEL EFFRON
3350 PEACHTREE RD., SUITE 1600
ATLANTA, GA 30326-0000

Office of the Chief Counsel/ MIA
333 South Miami Ave., Suite 200
Miami, FL 33130

Name: FINLAYSON-GREEN JACQUELINE

A76-531-649

Date of this notice: 04/10/2006

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ F.F. Krider
Frank Krider
Chief Clerk

Enclosure

Panel Members:
HESS, FRED

U.S. Department of Justice
Executive Office For Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A76 531 649 – Miami Date: Apr. 10, 2006

In re: JACQUELINE FINLAYSON-GREEN

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Rachel Effron, Esquire

ORDER:

PER CURIAM. On April 16, 2003, we dismissed the respondent's appeal, after an Immigration Judge ordered the respondent removed *in absentia*. More than 2 years later, on October 28, 2005, the respondent filed a late motion to reopen. *See* 8 C.F.R. § 1003.2(c)(2). The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) has not responded to the pending motion, which will be denied.

The Eleventh Circuit Court of Appeals has considered a deadline for filing a motion seeking to reopen an *in absentia* deportation order to be "jurisdictional and mandatory." *Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999); *see also Abdi v. U.S. Attorney General*, 430 F.3d 1148 (11th Cir. 2005).

In any event, we note that the respondent claims that she received ineffective assistance from an attorney, Dorothea Kraeger, who has been suspended from practice

before the Board. However, the respondent fails to adequately explain why she waited so long to file the pending motion. The motion states that after Kraeger was suspended, the attorney "turned over the respondent's case", to another attorney, Michael Franquina. The motion, and the respondent's affidavit, fail to state when this took place, or why Franquina could not have assisted the respondent in filing an earlier motion. The pending motion is, therefore, denied.

/s/ Frederick D. Hess
FOR THE BOARD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-12528-AA

JACQUELINE FINLAYSON-GREEN,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondents.

On petition for Review of a Final Order of the
Board of Immigration Appeals

ENTRY OF DISMISSAL

(Filed Sep. 8, 2003)

Pursuant to 11th Cir.R. 42-2(c), this appeal is hereby dismissed for want of prosecution because the petitioner has failed to file an appellant's brief and record excerpts within the time fixed by the rules, effective this 8th day of September, 2003.

THOMAS K. KAHN
Clerk of the United States Court
of Appeals for the Eleventh Circuit

By: /s/ Shirley M. Brown/emd
Deputy Clerk

FOR THE COURT –
BY DIRECTION

[SEAL] **U.S. Department of Justice**

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Kraeger, Dorothea P., Esquire
3707 North 7th Street
Suite 250
Phoenix, AZ 85014-0000

Office of the
District Counsel/MI
155 So. Miami Ave.,
Rm. 500
Miami, FL 33130

Name: FINLAYSON-GREEN, JACQUELINE

A76-531-649

Date of this notice: 04/16/2003

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Jeffrey Fratter
Chief Clerk

Enclosure

Panel Members:
COLE, PATRICIA A.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A76-531-649- MIAMI Date: APR 16 2003

In re: FINLAYSON-GREEN, JACQUELINE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kraeger, Dorothea P., Esquire

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

/s/ Patricia A. Cole
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
U.S. IMMIGRATION COURT
MIAMI, FLORIDA

IN THE MATTER OF:

/s/ Finlayson, Jacqueline) **Case No. A** 76-531-649
RESPONDENT)
RESPONDENT IN)
REMOVAL PROCEEDINGS)

On behalf of Respondent: **On behalf of Service**

/s/ Dorothea Kraeger **,Esq.** /s/ Chantel Dookes
No appearance in court **Assistant District Counsel**
[ ] PRO SE

WRITTEN DECISION OF THE IMMIGRATION JUDGE

Jurisdiction was established in this matter by the issuance of a Notice to Appear upon the Respondent. *See* Section 239 of the Immigration and Nationality Act, Exhibit No.1.

Notice that this removal proceeding was to be conducted on this date was given to the parties on October 19, 1999. *See* Exhibit No.1.1. The Respondent had a reasonable opportunity to be present but did not appear. No exceptional circumstances have been advanced why the Respondent was absent. This hearing was, therefore, conducted *in absentia* pursuant to Section 240 of the Immigration and Nationality Act. *See Matter of Marallaq*, 13 I&N Dec. 775 (BIA 1971); *Ibrahim v. INS*, 821 F.2d 1547 (11th. Cir. 1987)

[x] At a previous hearing the Respondent admitted the allegations of fact in the Notice to Appear and Conceded removability. I find removability is

established in accordance with the law. Removability conceded in motion to change venue.

[ ] At the hearing the Assistant District Counsel submitted evidence relating to the allegations in the Notice to Appear. See *Matter of Mejia*, 16 I&N 6 (BIA 1976). I find Respondent removable as charged. Section 240(b)(5)(A).

Any pending applications for relief from removal are considered abandoned. *See Matter of Balibundi*, 19 I&N Dec. 606 (BIA 1988). *Matter of Pearson,* 13 I&N Dec. 152 (BIA 1969). Cf. *Matter of Jean*, 17 I&N Dec. 100 (BIA 1979).

ORDER: The Respondent shall be removed to Jamaica on the charge(s) contained in the Notice to Appear.

Dated this 14th day of December, 1999.

/s/ Mahlon F. Hanson
MAHLON F. HANSON
U.S. Immigration Judge

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY:
MAIL ( ) PERSONAL (X) [MFH]

TO:
( ) ALIEN ( ) ALIEN c/o Custodial Officer
( ) ALIEN'S ATT./REP. (X) INS [MFH]

DATE: _____ COURT STAFF BY: _____
ATTACHMENT(S) ( ) EOIR-33 ( ) EOIR-28 ( )
LEGAL SERVICES LIST ( ) OTHERS___

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
U.S. IMMIGRATION COURT
155 South Miami Avenue, 9th Floor
Miami, Florida 33130

IN THE MATTER OF:

FINLAYSON, JACQUELINE *CASE NO. A-76-531-649*

[X] *RESPONDENT* *DECISION ON A MOTION*
[ ] *APPLICANT*

IN: [ ] *DEPORTATION* [ ] *EXCLUSION*

[X] *REMOVAL PROCEEDINGS* [ ] *PRO SE*

ALIEN ATTORNEY: DOROTHEA P. KRAEGER

DISTRICT COUNSEL:

A motion TO RECONSIDER DENIAL OF CHANGE OF VENUE REQUEST has been filed in the above captioned case. The Motion has been duly considered and it appears to the Court that:

[ ] The request is timely and reasonable. Therefore, IT IS HEREBY ORDERED that the Motion be *GRANTED*.

[X] The Motion has been duly considered and it appears to the Court that no substantial grounds have been advanced to warrant that it be granted. Therefore, IT IS HEREBY ORDERED that the Motion be and the same is hereby *DENIED*.

[X] The factual allegations have not been admitted. No telephonic master calendar hearing will be allowed.

cc: District Counsel
Counsel for
Respondent/Applicant
Respondent/Applicant

/s/ Mahlon F. Hanson
MAHLON F. HANSON
U.S. Immigration Judge

Date Signed: Dec. 14, 1997

Certificate of Service

THIS DOCUMENT WAS SERVED BY:
MAIL (M) PERSONAL (P)

TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer
[X] ALIEN'S ATTY/REP [X] INS

DATE: 12-14-99 BY COURT STAFF: [Illegible]
Attachments: [ ] EOIR-33 [ ] EOIR-28
[ ] Legal Services List [ ] Other

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
U.S. IMMIGRATION COURT
155 South Miami Avenue, 9th Floor
Miami, Florida 33130

IN THE MATTER OF:

FINLAYSON, JACQUELINE *CASE NO. A-76-531-649*

[X] *RESPONDENT* *DECISION ON A MOTION*
[ ] *APPLICANT*

IN: [X] *DEPORTATION* [ ] *EXCLUSION*

[X] *REMOVAL PROCEEDINGS* [ ] *PRO SE*

ALIEN ATTORNEY: *DOROTHEA P. KRAEGER*

DISTRICT COUNSEL:

A motion FOR CHANGE OF VENUE has been filed in the above captioned case. The Motion has been duly considered and it appears to the Court that:

[ ] The request is timely and reasonable. Therefore, IT IS HEREBY ORDERED that the Motion be *GRANTED*.

[X] The Motion has been duly considered and it appears to the Court that no substantial grounds have been advanced to warrant that it be granted. Therefore, IT IS HEREBY ORDERED that the Motion be and the same is hereby *DENIED*.

[X] No change of venue will be granted until **all** issues of removability are resolved. Respondent and her counsel are required to attend the scheduled hearing in Miami on December 14, 1999 at 9:00 a.m.

cc: District Counsel
Counsel for
Respondent/Applicant
Respondent/Applicant

/s/ Mahlon F. Hanson
MAHLON F. HANSON
U.S. Immigration Judge

Date Signed: November 29, 1999

Certificate of Service

THIS DOCUMENT WAS SERVED BY:
MAIL (M) PERSONAL (P)

TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer
[X] ALIEN'S ATTY/REP [X] INS

DATE: 12-01-99 BY COURT STAFF: [Illegible]
Attachments: [ ] EOIR-33 [ ] EOIR-28
[ ] Legal Services List [ ] Other